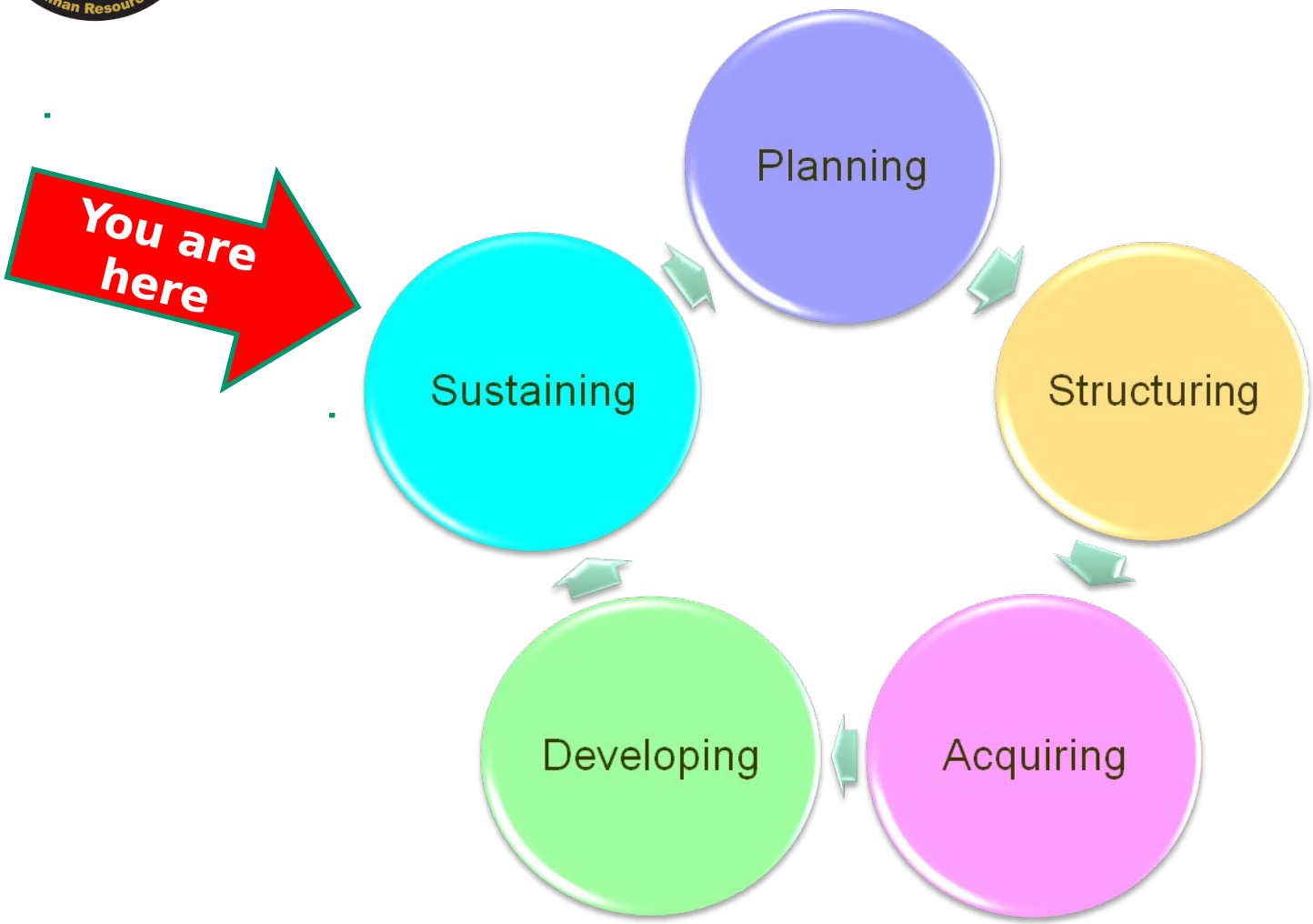
Lesson 5- 2
Sustaining: Management-Employee Relations

1 Oct 2009

CHRM Life Cycle



Learning Objectives – MER

Participants will be able to:

1.Describe Management-Employee Relations issues.

2.Explain the Labor Management Agreement (LMA)

3.Explain concepts and principles of adverse action process

4. Describe the appropriate steps in resolving performance problems

5. Apply the key concepts and describe the process for taking adverse action in various situations

Legacy System Legal Framework

Title 5 - Government Organization and Employees

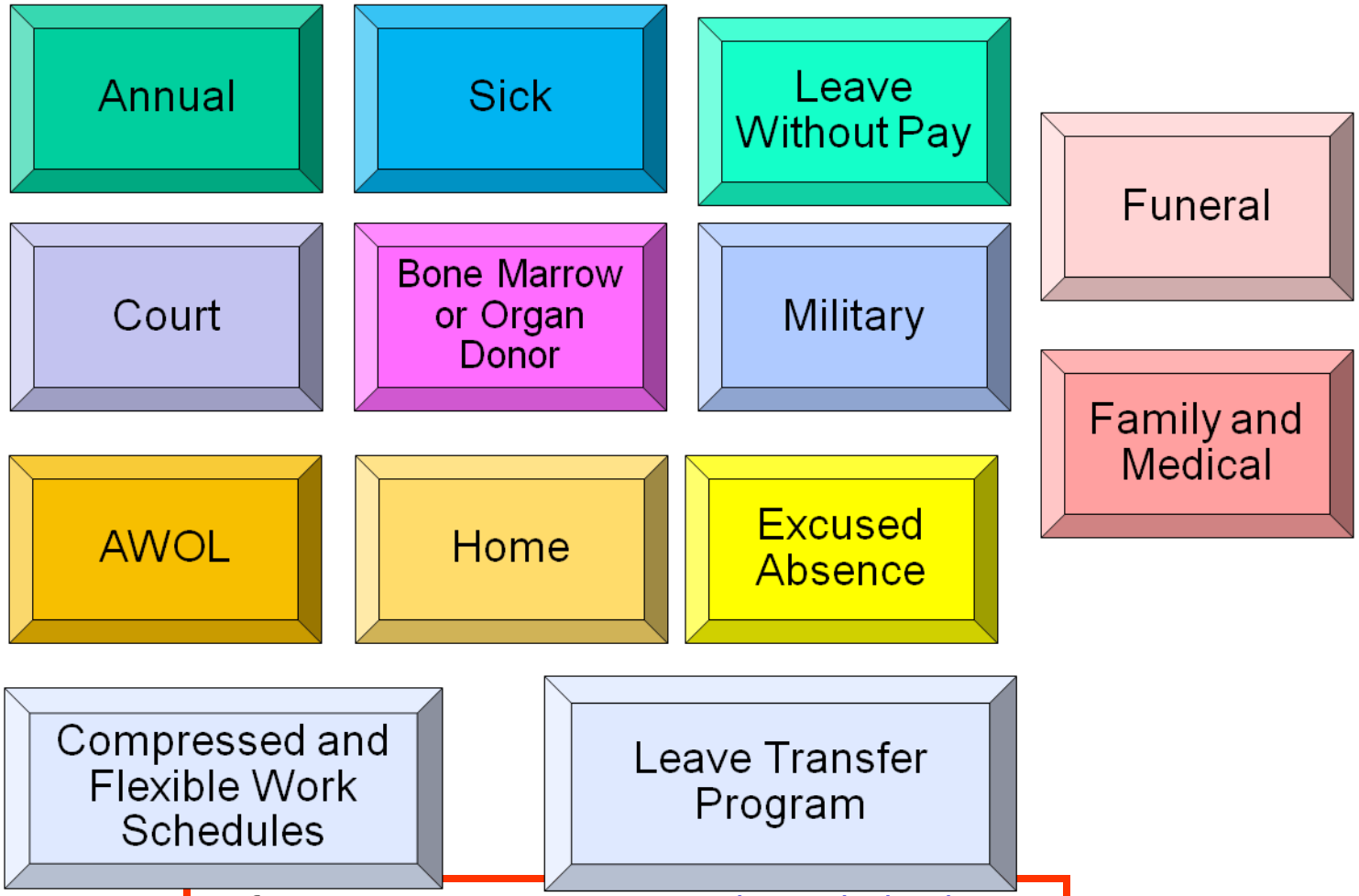
5 CFR Parts 1-699 - Administrative Personnel

Department of Defense Civilian Personnel Manual (CPM), DoD 1400.25-M

Course Overview

- Leave Programs
- Discipline - Adverse Action Concepts & Principles
- The Adverse Action Process
- Addressing Performance Problems
- Employee Redress Avenues – Grievances and Appeals

Leave Programs and Categories



Reference: www.opm.gov/oca/leave/index.htm
Reference: www.cpol.army.mil/library/permiss

What should you expect from your employee?

- Know leave procedures and follow them
- Be at work unless they have approved leave
- Ensure they have sufficient leave balance for requested leave
- Plan leave in advance whenever possible
- Bring in a doctor's note or medical documentation as required or when requested by their supervisor

Is it ok for employees to call in and ask their co-worker to tell you that they will not be in? What about if they called in but were not able to reach you?

Supervisory Responsibilities

Communicate the leave policies to your employees

Encourage leave planning

Monitor balance and usage

Control abuse and document problems - don't wait to address leave issues

Take corrective action when necessary

- Properly requested *annual* leave can only be denied for mission reasons
- Supervisor approves leave (includes acting)

Specific Situations – Leave Issues

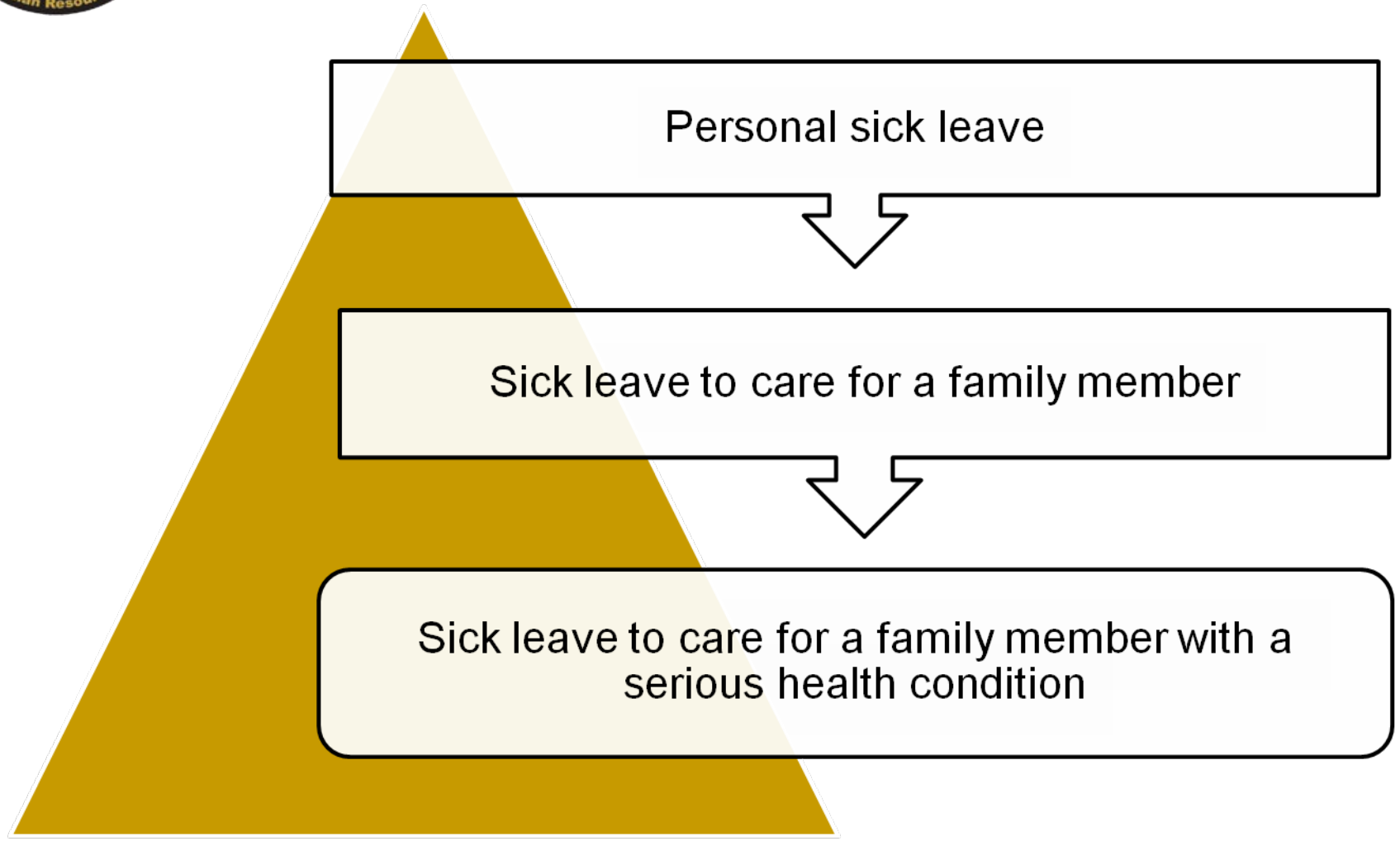
- Most frequent disciplinary offenses in the Army are leave related
  - Chronic tardiness
  - Leave abuse
  - Excessive absenteeism
  - Absent without official leave (AWOL)

Two most important actions you can take:

1) Establish and enforce the leave requesting procedure

2) Confront leave problems early

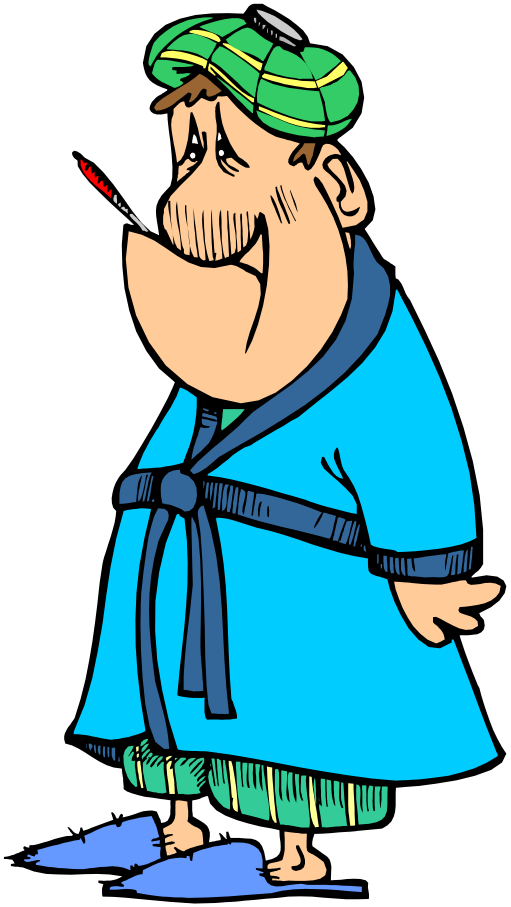
Types of Sick Leave


Personal sick leave
Sick leave to care for a family member
Sick leave to care for a family member with a serious health condition

Sick Leave Procedures

- Supervisor should establish call-in procedures and make sure all employees are aware of it - reminders!

- Employees responsible for requesting sick leave generally within 2 hours of beginning of shift
  - -Always check the Collective Bargaining Agreement



Personal Sick Leave

- Incapacitated to perform duties by
  - Physical or mental illness
  - Injury
  - Pregnancy or childbirth
- Receives treatment for:
  - Medical
  - Dental
  - Optical
- Jeopardizes health of others because of exposure to a communicable disease

Sick Leave to Care for a Family Member

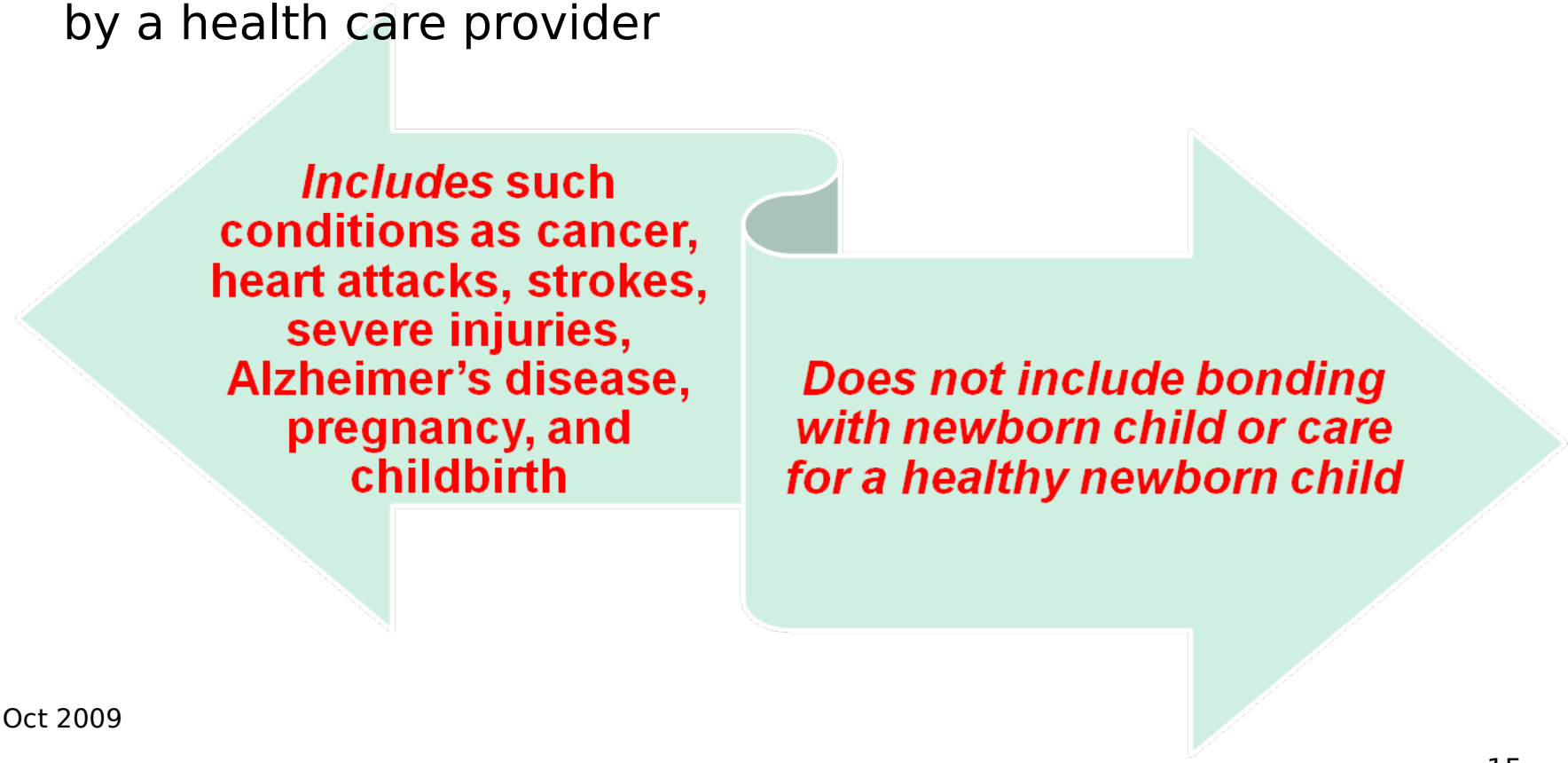
- Up to 104 hours (13 days) of sick leave each leave year to:
  - ✓ Care for family member (illness, injury, pregnancy, childbirth, and medical/dental/optical appointments)
  - ✓ Attend the funeral of a family member

Family Member Definition

- Spouse and parents thereof;
- Children, including adopted children, and spouses thereof;
- Parents;
- Brothers and sisters, and spouses thereof;
- Any individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship.

Serious Health Condition Definition

Definition: illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider


Includes such conditions as cancer, heart attacks, strokes, severe injuries, Alzheimer's disease, pregnancy, and childbirth
Does not include bonding with newborn child or care for a healthy newborn child

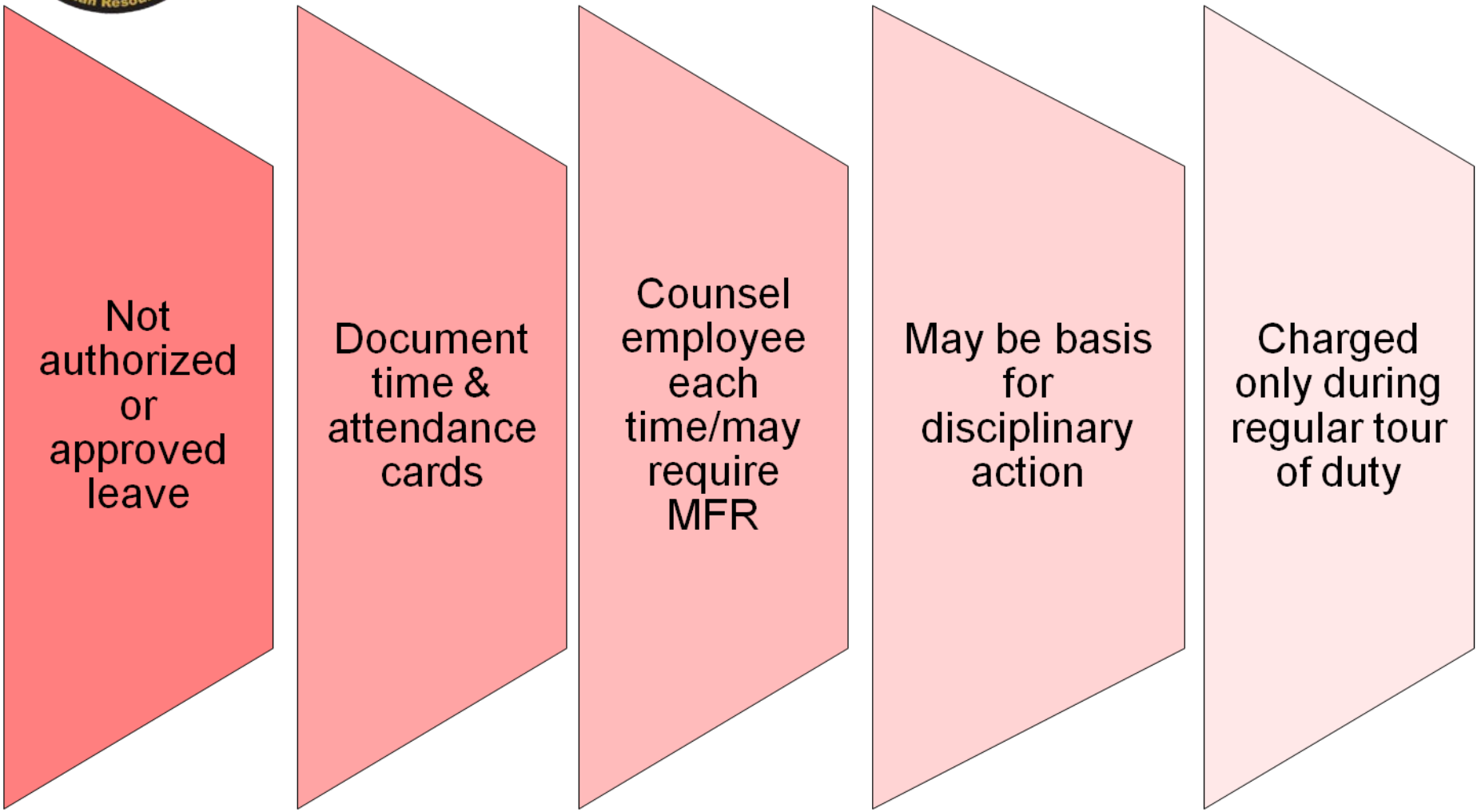
Sick Leave for Adoption

Authorizes use of sick leave for purposes related to adoption of a child

Includes appointments with adoption agencies, social workers & attorneys

May include time to bond with the child if required by court or adoption agency

Absence Without Official Leave (AWOL)


Not authorized or approved leave
Document time & attendance cards
Counsel employee each time/may require MFR
May be basis for disciplinary action
Charged only during regular tour of duty

Special Situations – Family Medical Leave Act (FMLA)

FMLA Leave Entitlement

- ❑ Birth & care of newborn child
- ❑ Placement of a child with employee for adoption/foster care
- ❑ Care of spouse/child/parent with serious health condition
- ❑ Serious health condition of employee that makes employee unable to perform the essential duties of his or her position
- ❑ Military Family Leave Entitlements

Interaction of Sick Leave and FMLA

- The definition of family member is a little narrower under FMLA
- May use or substitute up to 12 weeks of SL for FMLA if he/she is caring for a spouse, child or parent with a serious health condition
- May then invoke entitlement for an additional 12 weeks of unpaid leave (or *paid leave*)

FMLA - Quiz

1. A husband and a wife employed in the same agency are each entitled to 12 weeks of leave under the FMLA for the birth of a child or placement for adoption or foster care. True or False?
2. An employee is entitled to FMLA leave to care for a seriously ill grandparent. True or False?
3. Agencies may require employees to substitute their annual leave for LWOP under the FMLA. True or False?
4. If an agency can prove that an employee's absence would adversely affect mission accomplishment, the agency may deny an employee's request to take FMLA leave under a reduced leave schedule to care for a spouse with a serious health condition. True or False?

Dealing with the "Absent Employee"

I'm only a few minutes late

My car keep's breaking down

Others come late and you don't give them a hard time

I called in and left you a voice message

Leave Restriction Letter

All sick leave requires medical certificate

Spells out in detail leave requesting procedures

Letter Includes:

- Reasons for…
- Problems specified
- Rules/expectations specified
- Offer of assistance
- Consequences/follow-up

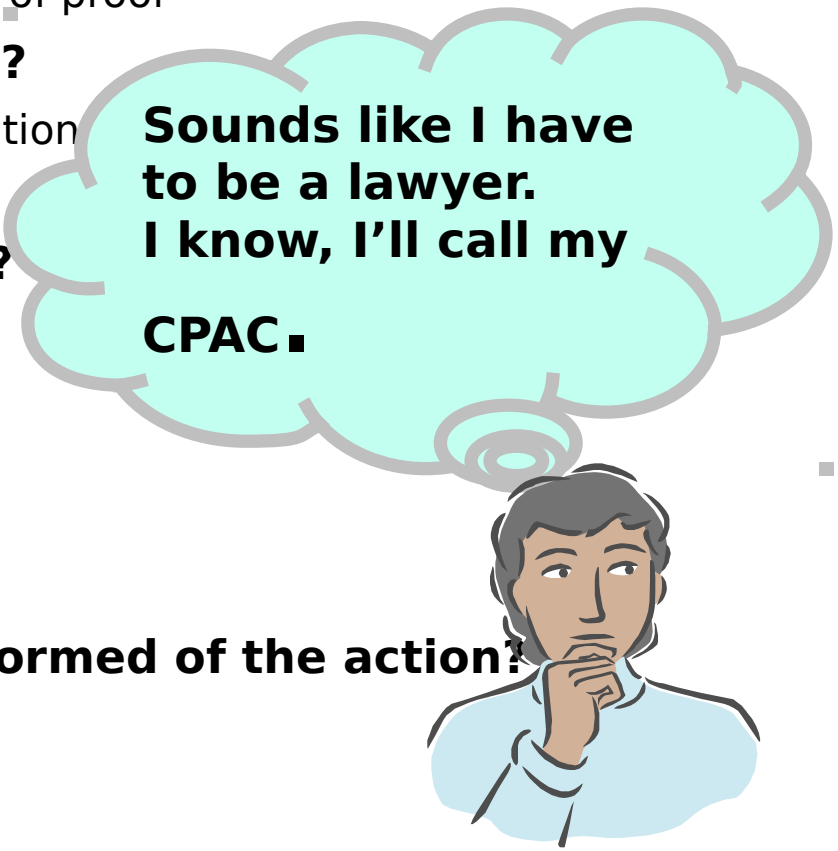
Check collective bargaining agreement

Discipline- Concepts & Principles

- Timely - action must be taken promptly to be supportable and meaningful
- Reasonable - penalty must fit the offense
- Consistent - similar penalty for similar offense
- Non-discriminatory - action must be based on merit's of the case

The Adverse Action Process

- **Is there a basis for adverse action?**
  - Nexus, burden of proof and standard of proof
- **Have the facts been established?**
  - Conducting the fact-finding investigation
  - Identifying the proper charge
- **Does the penalty fit the offense?**
  - Range of options
  - Performance or conduct
  - Progressive discipline
  - Table of penalties
  - The Douglas Factors
- **Has employee been properly informed of the action?**
  - Understanding due process
  - The Proposing & Deciding Official



Basis for Action

- 5 USC, Sec. 7513. Cause and procedure: "…an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service…"
- Adverse affect on the agency mission means that a reasonable connection or *nexus* exists between misconduct and:
  - ✓ Employee's ability to perform his/her job
  - ✓ Ability of other employees to perform their jobs
  - ✓ Ability of the agency to perform its mission

Efficiency of the Service and Nexus

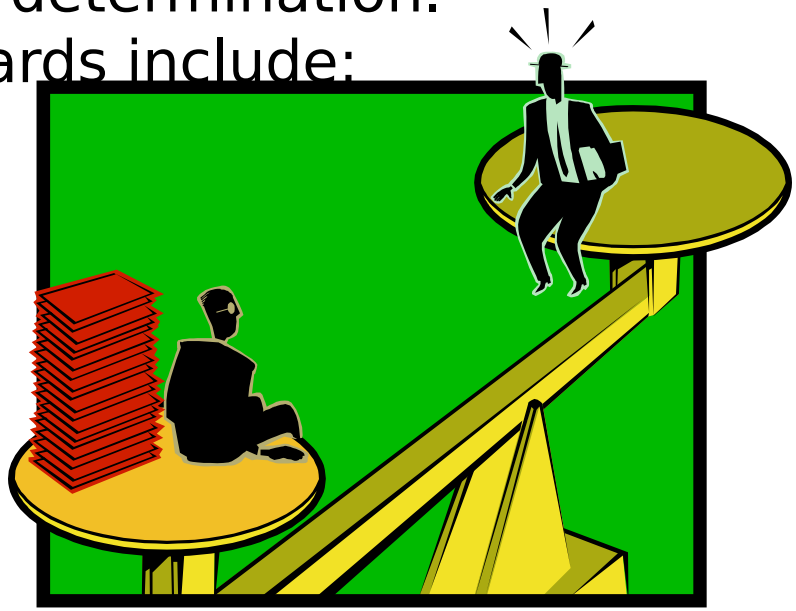
- There must be a connection (nexus) between the employee's performance/conduct and its impact on the workplace
  - ✓ MSPB cases have demonstrated that performance/conduct does not have to have violated a written regulation

Off-Duty Misconduct

- Must establish a nexus between the incident and service efficiency
- Nexus may exist if management can show it lost trust and confidence in the employee's ability to perform
- Nexus may exist if able to prove that the off-duty misconduct conflicts with the mission
- Nexus may exist if able to demonstrate that management fears for the safety of the employees
- "Egregious" standard - depending on the nature and gravity of the situation, a presumption of nexus may arise. The conduct is so heinous, the act speaks for itself

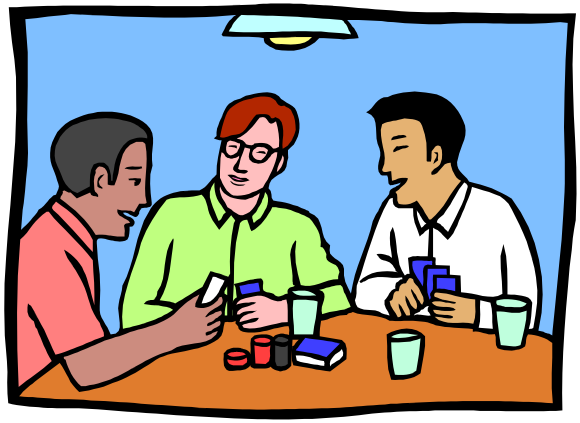
What is the Burden of Proof Standard?

- Burden of proof: Obligation to establish - through the introduction of evidence - facts or conclusions that are in controversy
- Standard of proof: Amount or level of proof required to establish a fact or support a determination. Examples of evidentiary standards include:
  - ✓ Evidence beyond a reasonable doubt
  - ✓ Clear and convincing evidence
  - ✓ Preponderance of evidence
  - ✓ Substantial evidence



Have facts been established?

- What is a fact?
  - ✓ Something that
    - Can be shown to be true, to exist, or to have happened
    - Is based on or concerned with the evidence presented in a legal case
  - ✓ Circumstances of an event, motion, occurrence, or state of affairs, rather than an interpretation of its significance



- Fact or Inference?

The Card Game

DIRECTIONS:

1. The instructor will read you a story and you will be given time to respond to the statements below.
2. The instructor will only read the story once.
3. No questions are allowed.
4. Answer each question by indicating T or F or ?

T Means the statement is definitely true on the basis of story

F Means it is definitely false

? Means you cannot be certain on the basis of information given

Conduct a Fact-Finding Investigation

WHY INVESTIGATE.....?

Purpose of a fact-finding investigation is to find out what really happened by establishing and proving facts

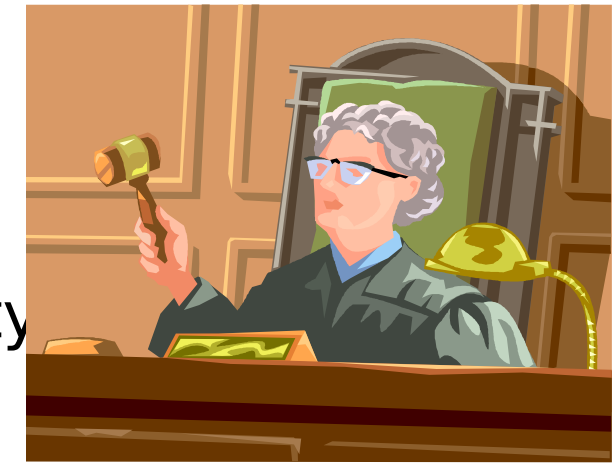
Conduct a Fact-Finding Investigation (cont)

ONCE YOU FIND OUT THE FACTS…

- decide whether to discipline
  - whom to discipline
    - for what reason(s)

Two main reasons agencies lose their case:

- Did not prove the facts, or
- Proved the facts, but the penalty did not fit the crime



Conduct a Fact-Finding Investigation (cont)

INVESTIGATING THE INCIDENT…

Remember, purpose is to establish facts

- ❑ Get employee's side of the story first whenev possible
- ❑ Contact the employee as soon as possible
- ❑ Be aware of
  - ✓Right to representation (Weingarten)
  - ✓Privacy Act concerns

Conduct a Fact-Finding Investigation (cont)

Next step is to:

- Interview anyone who witnessed or could have witnessed the incident
- Be sure to talk to all, even those who say nothing happened
- Get something in writing from witnesses

Conduct a Fact-Finding Investigation (cont)

BE SURE TO DOCUMENT YOUR FINDINGS!

- ❑ Describe the incident/discussion in detail:
  - ✓Date & time
  - ✓Place
  - ✓Witnesses
  - ✓Behavior
  - ✓Tell it like it is

- ❑ What about that super secret supervisory folder?

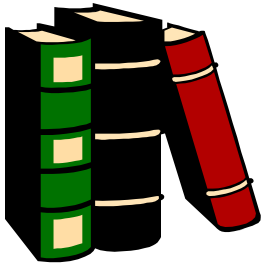
Progressive Discipline

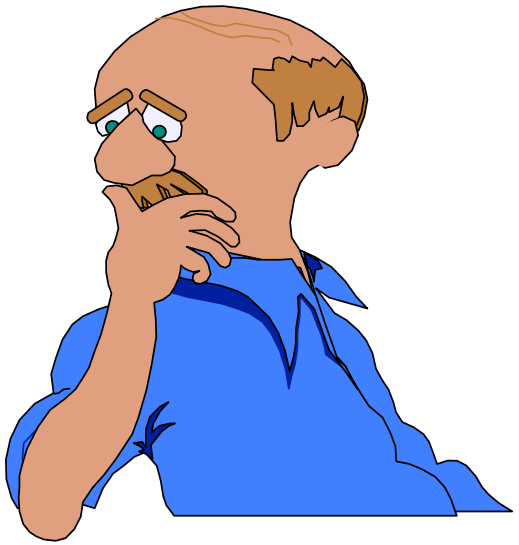
- Approach to modifying undesirable employee behavior through the use of a range of disciplinary consequences
  - ✓ Applied depending upon nature and history of employee's misconduct
- Series of increasingly serious responses to repeat problems by employees
- Intent is to correct the conduct

Continuum of severity

Table of Penalties

- Consult the “Table of Penalties”
  - ✓ Provides list of offenses & suggested penalties
  - ✓ Good reference for charges





The Douglas Factors

- Nature and seriousness of the offense
- Employee's job level, type of employment
- Employee's past disciplinary record
- Employee's past work record
- Effect of the upon the employee's ability to perform satisfactorily
- Consistency of penalty for similar offenses of other employees
- Consistency of penalty with agency's table of penalty
- Notoriety of offense, impact on agency reputation
- Employee warned or clearly aware of rules
- Potential for rehabilitation
- Mitigating circumstances
- Adequacy, effectiveness of alternative sanctions to deter future misconduct

Applying the Douglas Factors

- Balancing act – Penalty needs to be fair, reasonable and consistent
- MSPB did not assign weight to the factors
- Not all factors apply to every case
- Deciding officials must consider the relevant factors and decide if they mitigate or aggravate the penalty selection
- Douglas Factors are subsumed in one question: Did the agency take the least possible sanction that will adequately protect its legitimate interest?

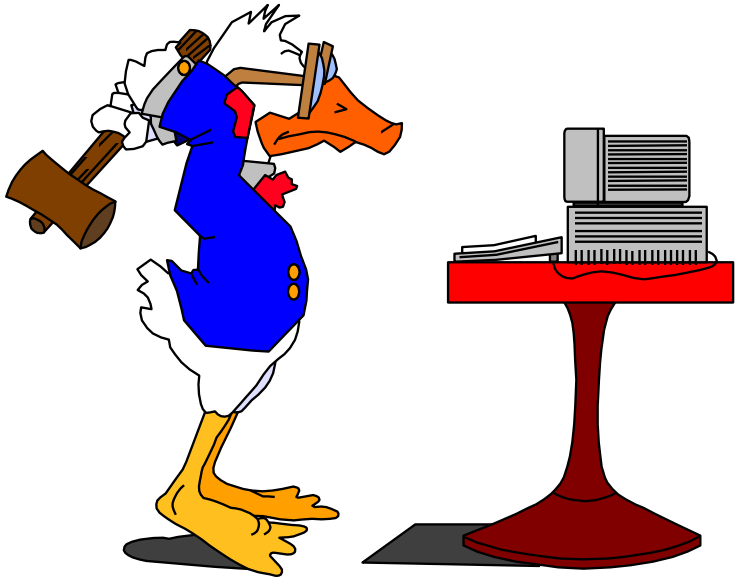
Does the Penalty Fit the Offense

To determine the proper penalty, keep the following guiding principle in mind:

"Like penalties

for like offenses

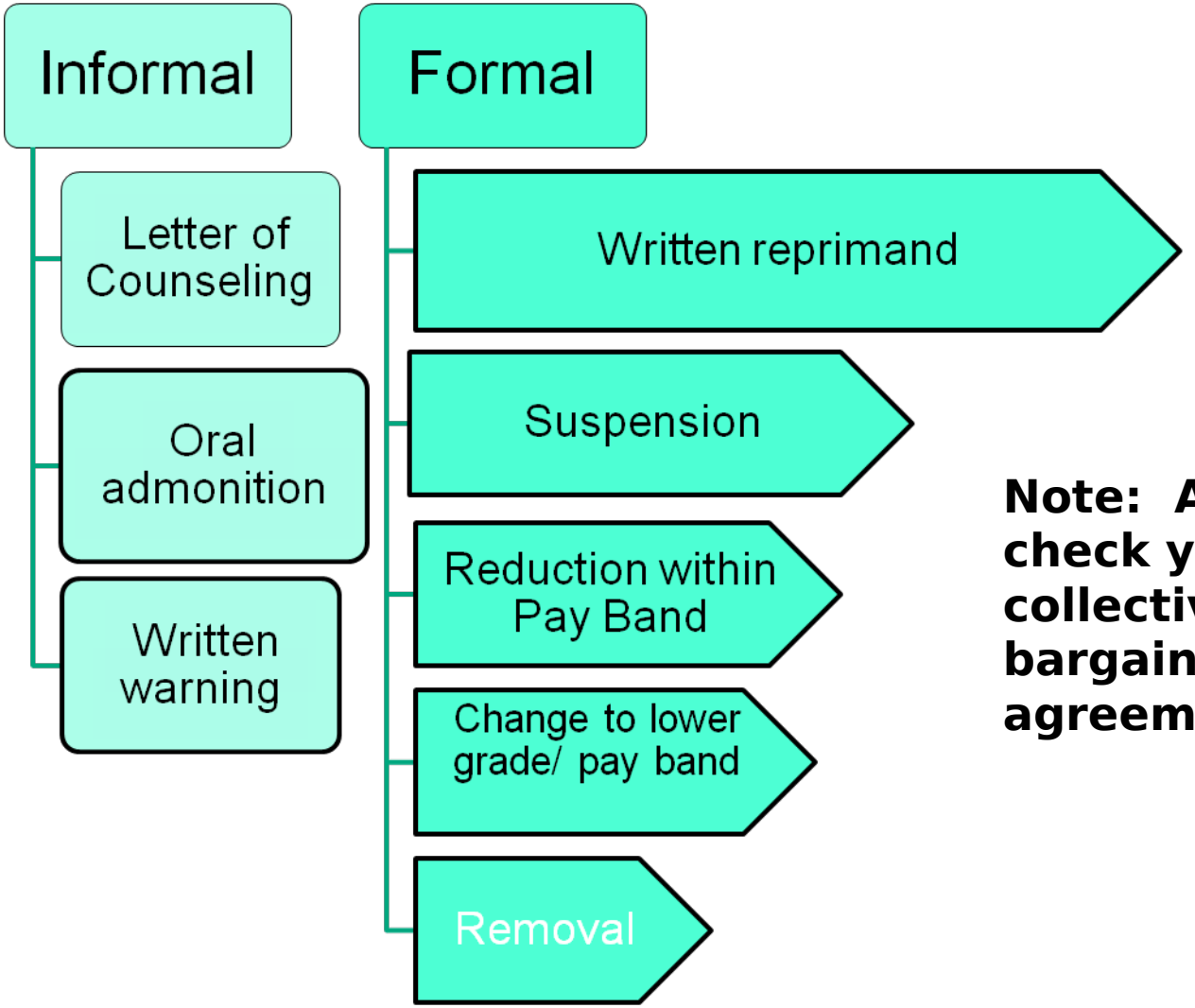
in like circumstances"



Specific Situations – Probationary Employee

- Probationary period is a management tool
  - ✓ Monitor probationary employees closely
    - May terminate at any time for almost any performance deficiency or misconduct with limited rights
  - ✓ Effect termination in a timely fashion
  - ✓ Coordinate termination with HR
  - ✓ Deal with pre-appointment issues
- Supervisory probationary period

Range of Options



Note: Always check your collective bargaining agreement

Proposing the Action

- The Proposal Letter
  - ✓Properly framed charges
  - ✓Proposed penalty
  - ✓Specific facts

Proposing Official

- Most often, 1st line supervisor is the proposing official
- Supervisor determines facts & need for action
- Coordinate with the HR Advisor
- Issue proposal letter (document and support the aggravating factors
- Other considerations:
  - ✓Employee Assistance Program (EAP) statement

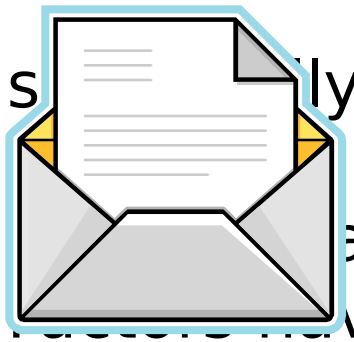
Deciding Official

- Provides impartial review of adverse action
- Consider all relevant Douglas Factors
- Must consider *mitigating factors*
- Receive and consider employee's response
- Only consider the facts & charge(s) documented in the proposal letter
- Renders final written decision in a timely manner

If action is reviewed by a 3rd party, it is the deciding official usually called to testify not the proposing official

Content of the Decision

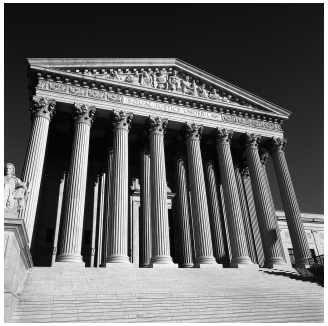
- Reference to proposal
- Nature of employee reply
- Consideration given to employee reply decision
- Effective date of resulting action
- Rights to grieve or appeal (if applicable)



The decision letter does not have to s ly list each *Douglas* Factor and how it the case. However, ation that the Douglas ve been considered is critical

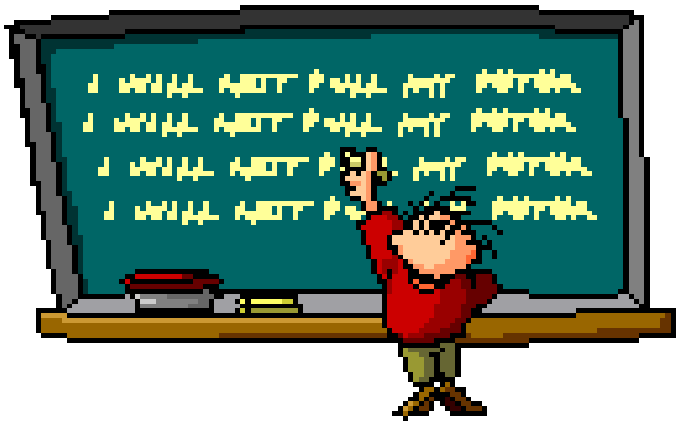
Employee Due Process

- Reasonable advance notice including statement of the specific facts in support of the proposed action
- Opportunity to review the materials relied upon, including the governing regulations
- Opportunity to reply
- Right to representation
- Written notice of decision
- Opportunity to grieve, appeal or file an EEO complaint



The Letter of Reprimand

- First formal action
- Goes into employee's OPF
- No proposal or decision letter
  - ✓ Always check your collective bargaining agreement



The Letter of Reprimand (cont)

- Coordinate with your HR Advisor
- Letter should contain:

-Description of offense(s)
-Retention in OPF (1yr. - 3 yr.)
-Recount former instances
-Warning of more severe action
-Advice of EAP
-Grievance rights (AR 690-700, Ch 751)

Discussion Questions

1. Reckoning period
   - For how long can you hold a formal action against an employee?
   - 6 months? 1 year? 3 years? 5 years? 10 years? Forever?
2. Penalty enhancement
   - How do you move from a first offense, to second offense, to the third offense?
3. Can you still reference a letter of reprimand that expired?

Specific Situations – Unacceptable Performance

Step 1 – Communicating Expectations

- Performance Plan must:
  - ✓ Consist of objectives/responsibilities (specific duties of the job) and standards(how the supervisor is going to measure how well the employee performs those objectives/responsibilities
  - ✓ Communicate in counseling sessions, written instructions, in the PIP or in any manner calculated to apprise the employee of the requirements against which the employee will be measured
- The midpoint discussion needs to be documented by initialing on the performance plan.

Step 2 – Provide an Opportunity to Improve (PIP)

- Employee has the right to a reasonable opportunity to improve (normally 60-120 days)
- PIP required by AR 690–400 for unsuccessful performance
- PIP identifies consequences of continued failure
- Relate deficiencies to job objectives and expectations, and the required actions to improve to successful

Step 2 – Provide an Opportunity to Improve (PIP)

- PIP notices should define assistance which will be provided:
  - ✓ Performance coaching and counseling
  - ✓ On-the-job training or formal training
  - ✓ Closer supervision
  - ✓ Oral/written warnings, Letter of counseling
  - ✓ If employee improves, must sustain improvement for one year from beginning of PIP or face action without additional PIP (unless failure is on an objective that the PIP didn't cover)

Step 3 – Proposed Action and Due Process

- Advance Written Notice (Proposal) :
  - ✓ 30 Day notice of proposed action
  - ✓ Specific instances of unacceptable performance of critical elements/objectives
  - ✓ Only instances which occurred in 12 months preceding date of advance notice
  - ✓ Right to Representation (designated in writing)
  - ✓ Right to reply orally and/or in writing

Step 3 – Proposed Action and Due Process

- Written Decision Notice :
  - ✓ Within 30 days after expiration of notice period
  - ✓ Specific instances of unacceptable performance
  - ✓ Concurrence by higher level official
  - ✓ Must consider employee's reply
  - ✓ Consider any improvement during notice period
  - ✓ State effective date
  - ✓ Provide grievance or appeal rights

Dealing with Unacceptable Performance under TAPES (Legacy) rules

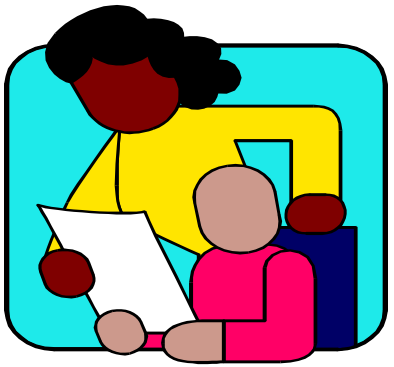
STEP 1: Setting and communicating the performance expectations

STEP 2: Provide an Opportunity to Improve period (PIP)

STEP 3: If no improvement, take the action

Step 2 – Communicating Performance Deficiencies

- Discuss situation in private with the employee
- Relate deficiencies to job objectives and expectations
- Offer employee assistance program
- Must inform employee of the job objective
  that s/he is failing
  - ✓ Consider providing the employee with a memo that further spells out and clarifies the job objective



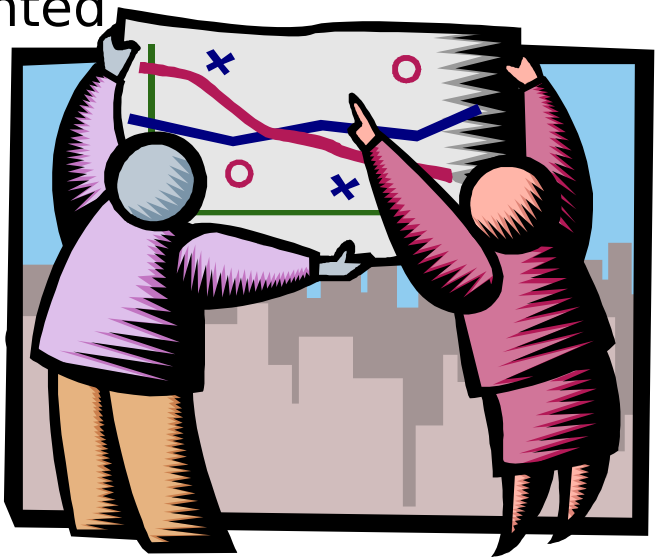
Step 3 - Remedial Action

- Range of options to address unacceptable performance
  - ✓ Performance coaching
  - ✓ On-the-job training or formal training
  - ✓ Self-improvement plan and/or improvement period
  - ✓ Oral/written warnings, Letter of counseling

This is a suggested list of options. Consider other options that are appropriate. Make sure to consult with your HR Advisor.

Step 3 (cont) – Documenting Remedial Action

- Management has an obligation to assist employee in improving unacceptable performance
  - ✓ This assistance must be documented
- Is a PIP Required by NSPS?
  - ✓ No, but strongly encouraged
- Document, document, docum



The Special Purpose Rating of Record

- The Special Purpose Rating of Record may only be applied in the case of an employee with a Level 1 rating of record who exhibits significant and sustained improvement (not less than 90 days) in his or her performance that equates to Level 2 performance or higher
- A special purpose rating of record may be assigned during the appraisal period in addition to the regularly completed rating of record

Step 4 – Taking Adverse Action

- If employee does not improve, determine the appropriate action to take:
  - ✓ Reassignment to other duties or position
  - ✓ Reduce within the pay band
  - ✓ Reduce to lower pay band
  - ✓ Removal

Employee Redress Avenues - Grievances and Appeals

Redress Avenues & Independent Agencies

- Agency administrative grievance systems for disputes not covered by a collective bargaining agreement
- Negotiated grievance procedure for disputes covered by a collective bargaining agreement
- Merit Systems Protection Board (MSPB): Significant personnel actions
- Equal Employment Opportunity Commission (EEOC): Discrimination claims
- Office of Special Counsel (OSC): Whistleblower, Hatch Act and Prohibited Personnel Practices
- Federal Labor Relations Authority (FLRA): Various labor-management issues such as negotiability disputes
- Alternative Dispute Resolution (ADR)

Grievance Definition

- Any employment matter may be grieved under the AGS (SC771.4.2.2.)
  - ✓ Involves a matter of personal concern
  - ✓ Must be subject to control of management
  - ✓ Requested personal relief is available

The Grievance Process

- Negotiated Grievance Procedure
  - ✓ Covers bargaining unit employees
  - ✓ Grievance means any complaint:
    - By any employee or the labor union concerning any matter relating to the employment of the employee
    - By any labor organization concerning any matter relating to the employment of the employee
    - By any employee, labor organization, or agency concerning the effect of interpretation or a claim of breach of a collective bargaining agreement. Any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.
- The Administrative Grievance Procedure

Administrative Grievance Procedure – Purpose

- To provide a fair, equitable and timely forum for review and resolution of employment-related matters

Administrative Grievance Procedure

- Informal problem solving step:
  - ✓ Employee presents grievance informally to supervisor within 15 calendar days of event creating dissatisfaction or when employee became aware of dissatisfaction
  - ✓ Management responds within 15 calendar days
  - ✓ If employee is not satisfied, management informs employee of available grievance/appeal procedures

Administrative Grievance Procedure

- Formal grievance
  - ✓ If employee is not satisfied with informal decision, may file a written grievance within 15 calendar days of receipt of informal decision
  - ✓ Deciding official may resolve using alternative dispute resolution technique:
    - mediation
    - fact-finding
    - settlement conference
    - arbitration

Administrative Grievance Procedure

- Formal grievance
  - ✓ Deciding official issues a final and binding written decision within 60 days of receipt of grievance
  - ✓ To higher level if cancelled or no decision in 90 days

Alternative Dispute Resolution

"Any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and the use of ombuds, or any combination thereof."

--Administrative Dispute Resolution Act of 1996

Alternative Dispute Resolution

- "It is Army policy to encourage the use of ADR whenever appropriate, the goal being to resolve disputes at the earliest stage feasible, by the fastest and least expensive method possible, and at the lowest possible organizational level."
- Always consider as an alternative when appropriate
- Preserves the relationship
- Less costly than litigation

ADR – What is it?

Key elements of ADR—

- Neutral third party (e.g., mediator)
- Self-determination of the parties as to outcome
- Confidentiality
- One or more “issue(s) in controversy
- Not limited to the “legal” issues of the case
- Usually pursues an “interest-based” approach to develop options for resolution

Supervisor's Role in Mediation

- If involved in mediation—
  - Prepare for the mediation--know the case
  - Set aside time for mediation without distraction
  - Identify the *interests* and think of ways to satisfy them
  - Mediate in good faith--keep an open mind
    - Doesn't mean you have to settle!
  - Know the limits of your authority
  - Be specific in the settlement agreement

Non-Grievable Actions

- Under Administrative Grievance System:
  - ✓ DOD regulation contains 14 specific exclusions
  - ✓ Component can request other exclusions from DOD through OPM

DoD 1400.25-M, Subchapter 771

Merit Systems Protection Board (MSPB)

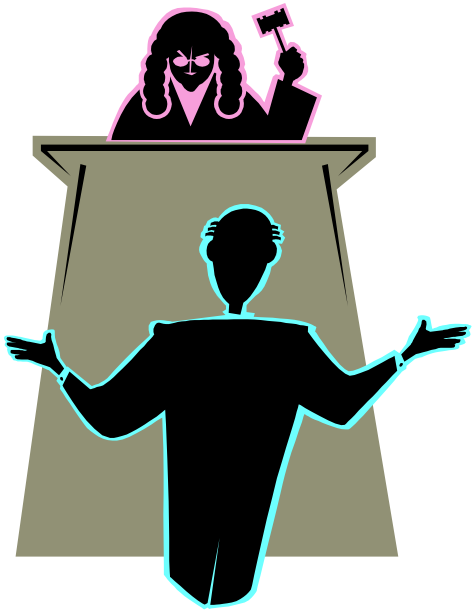
- Independent Government Agency
- Operates like a court
- Ensures actions taken against employees are based on Merit Principles
- Adjudicates employee appeals
- Regional offices

Judicial Review & The MSPB

- The Board will not order a more serious penalty than that imposed by the agency

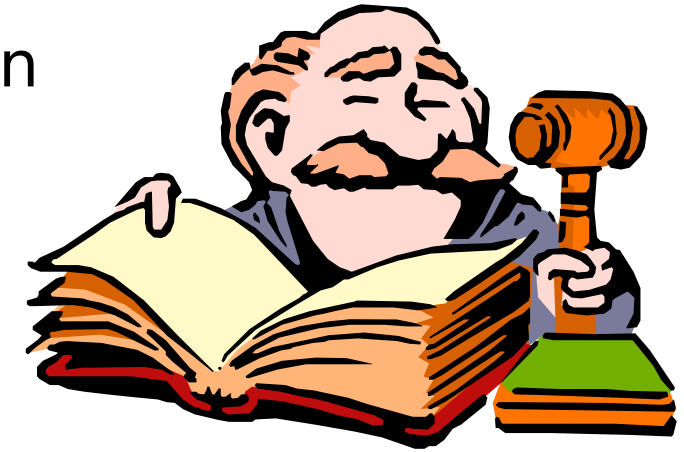
- The MSPB's job is to decide whether the agency's choice of penalty is reasonable, not to impose what it believes is the most reasonable penalty

- The Board reviews the penalty to determine whether the agency considered all the relevant factors and exercised its discretion within tolerable limits of reasonableness



Appeal Process

- Employee is in receipt of a decision notice of an appealable action
- Employee files petition for appeal
- Settlement discussions
- Hearing (at discretion of appellant)
  - ✓Yes: Discovery
  - ✓No: Judge issues decision
- Decision by Administrative Judge



Appealable Actions

- Suspension exceeding 14 days
- Reductions in grade or pay
- Removals
- Furloughs of 30 days or less
- Denials of within-grade increases
- RIF
- OPM suitability determinations
- OPM determinations on retirement matters
- Denials of restoration of reemployment rights
- Terminations of probationary employees under limited circumstances

Considering Misconduct in the Rating of Record

- Is it allowable to take misconduct into consideration when determining the employee's rating under NSPS?

Impact of Misconduct on Performance

- *Yes!* See NSPS Implementing Issuance SC1940.8.2.3.1.
  - ✓ If an employee engages in work-related misconduct and the nature and severity of that misconduct have a negative impact on the execution of his or her duties, that of the team, and/or that of the organization or it's customers, the impact *may be reflected in the employee's rating of record*
  - ✓ SC 1940.5.2 mentions general behavioral expectations stated in the DoD Directive 5500.7, Joint Ethics Regulation

Supervisory Responsibility

- SC1940.10.3.2. When rating job objectives, a supervisor must consider <u>all applicable performance and conduct information</u>, including, but not limited to, employee and closeout assessments that apply to the current appraisal period

How to Consider Misconduct in the Rating of Record

- Consider the impact of the misconduct
  - ✓ Not the mere fact that the employee was disciplined or the mere fact that misconduct occurred
  - ✓ Formal action may not have been taken and is not necessary to establish misconduct
- Tie the misconduct to the job objective (performance indicators) and/or contributing factors (benchmarks)

Points to Consider…

- A rating of record may not be lowered based solely on an approved employee absence from work, including the absence of a disabled veteran to seek medical treatment (SC1940.10.2.)

- The fact that misconduct may impact the employee's rating of record at the conclusion of the appraisal period should not be the basis for delaying corrective action, including initiating an adverse action under Reference (a). (SC1940.8.4.4.2.)

Module 5-2 Review

Summary

- Describe the various leave programs
- Explain the key concepts and principles in the adverse action process
- Describe the appropriate steps in resolving performance problems
- Apply the key concepts and describe the process for taking adverse action in various situations
- Questions